

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NOE ORTEGA PEREZ,

Petitioner,

v.

BAKER, WARDEN, et al.,

Respondents.

Case No. 3:17-cv-00538-HDM-CLB

ORDER

This is a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by a Nevada state prisoner. The petitioner, Noe Ortega Perez, challenges his 2010 state court conviction, following a jury trial, of six counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under 14 years of age. (Pet. Ex. 33).¹ The first amended petition comes before the court for consideration of the merits. (ECF No. 17). Respondents have answered (ECF No. 28), and the petitioner has filed a reply (ECF No. 37).

I. Factual and Procedural Background

On April 17, 2009, the petitioner was charged by way of indictment with eight counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under 14

¹ The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 18-21, 23 and 29-30. The petitioner's exhibits, located at ECF Nos. 18-21 and 23, are cited as Pet. Exs. The respondents' exhibits, located at ECF Nos. 29-30, are cited as Resp. Exs.

1 years of age, for acts that he engaged in with his 13-year-old
2 niece-by-marriage, R.B., on September 13, 2008. (Pet. Exs. 3-10).²

3 On September 2, 2009, the State noticed the expert testimony
4 of Dr. John Paglini. (Resp. Ex. 11). The notice stated that Dr.
5 Paglini would "testify as to grooming techniques used upon
6 children." (*Id.*) Attached to the notice was Dr. Paglini's
7 curriculum vitae. (*Id.*) On October 12, 2009, defense counsel moved
8 to exclude Dr. Paglini's testimony on the grounds that the notice
9 was insufficient. (Pet. Ex. 15). The court denied the motion. (Pet.
10 Ex. 14 (Tr. 23)).

11 At the trial, which commenced on October 15, 2009, the
12 following relevant evidence was presented.

13 On September 12, 2008, the petitioner, his wife, Maria Perez,
14 and their 13-year-old niece R.B., traveled by car to Las Vegas.
15 (Pet. Ex. 19 (Tr. 66)). A week prior, the petitioner told Maria
16 Perez that he had purchased three tickets for a concert in the
17 city and that they should bring R.B. along. (Pet. Ex. 20 (Tr.
18 133)).

19 On the way to Las Vegas, the petitioner, Maria Perez, and
20 R.B. stopped at a restaurant, where the petitioner played footsie
21 with R.B. under the table. (Pet. Ex. 19 (Tr. 67)). After checking
22 into the hotel room, they walked down Las Vegas Boulevard. As Maria
23 Perez walked in the front, the petitioner and R.B. held hands.
24 (*Id.* at 68-69). Maria Perez noticed during the walk that the
25 petitioner was grabbing R.B.'s shoulder. (Pet. Ex. 20 (Tr. 131-
26 32)). To R.B., Maria Perez appeared upset when she saw this. (Pet.
27 Ex. 19 (Tr. 70)).

28 ² One of the lewdness counts was later dropped. (Pet. Exs. 13, 16).

1 Later that night, back in the hotel room, the petitioner
2 kissed R.B. while Maria Perez was in the bathroom. (*Id.* at 71-77).

3 The next day while swimming at the hotel pool, the petitioner
4 flirtatiously touched R.B. under the water. (*Id.* at 78)). R.B.
5 told the petitioner that she was enjoying the trip and that she
6 wished she could be there alone with him. (*Id.* at 79). Around 2 or
7 3 p.m., they returned to the hotel room, where first R.B. and then
8 Maria Perez took a shower. (*Id.* at 80-81). While Maria Perez was
9 in the bathroom, the door slightly ajar, the petitioner began to
10 kiss R.B. (*Id.* 83-84). The petitioner paused to go into the
11 bathroom and check in on Maria Perez, and he closed the bathroom
12 door upon his return. (*Id.* at 84-85). The petitioner then knelt in
13 front of R.B., who was by then sitting on the corner of one of the
14 beds. (*Id.* at 85-86). They kissed again, then lay on the bed, where
15 the petitioner pulled down R.B.'s pants and panties. (*Id.* at 86-
16 87). The petitioner then touched and penetrated R.B.'s vagina with
17 his fingers and tongue and kissed her breasts. (*Id.* at 88-89).

18 R.B. testified that she did not want to kiss the petitioner
19 but did not tell him no and in fact kissed him back because she
20 had feelings for him and she wanted him to know that. (*Id.* at 134-
21 36). She testified that she told the petitioner she wanted to be
22 alone with him because of those feelings, but that she did not
23 expect him to do all the things he did. (*Id.* at 98-99, 137, 139).
24 She was surprised when he pulled her pants down, and she did not
25 want him to pull her pants down, but she did not scream because
26 she was afraid Maria Perez would be mad and did not stop the
27 petitioner because she was afraid of losing his trust. (*Id.* at
28 152, 166).

1 Maria Perez came out of the bathroom to retrieve a sponge,
2 saw R.B. and the petitioner together on the edge of the bed, and
3 began to yell. (*Id.* at 89; Pet. Ex. 20 (Tr. 141-43)). Hitting the
4 petitioner, Maria Perez asked what was going on. (Pet. Ex. 20 (Tr.
5 144-45)). Neither the petitioner nor R.B. responded. (*Id.* at 145).
6 R.B. quickly pulled up her pants and the petitioner stepped back.
7 (Pet. Ex. 19 (Tr. 92); Pet. Ex. 20 (Tr. 142-43)). Maria Perez
8 grabbed and opened her cell phone, and the petitioner knocked it
9 out of her hands. (Pet. Ex. 19 (Tr. 93)). Yelling, screaming, and
10 crying, Maria Perez asked R.B. what happened. When R.B. did not
11 answer, Maria Perez began to slap her. (*Id.* at 93-94)). As the
12 petitioner pulled Maria Perez off R.B., hotel security knocked at
13 the door. (*Id.* at 94-95).

14 The two hotel security officers who responded to the room
15 heard arguing and things being thrown around as they approached.
16 (Pet. Ex. 22 (Tr. 31-33)). After they knocked, the petitioner
17 opened the door and said, "I didn't do anything." (*Id.* at 33). The
18 petitioner then went down the hallway with one officer while R.B.
19 and Maria Perez went with the other officer. (*Id.* at 34). Maria
20 Perez, who was crying, shaking and very upset, told the officer
21 that when she had opened the door she saw R.B.'s pants and panties
22 down to her upper thigh, which she indicated by pointing to her
23 upper thigh. (*Id.* at 35-36). Maria Perez said she wanted to press
24 charges, so the officer took her to another location to fill out
25 voluntary statements. (*Id.* at 36-37). The officer wrote down what
26 Maria Perez said verbatim and read it back to her before Maria
27 Perez signed it. (*Id.* at 38-39).

28

1 When the police arrived, Maria Perez reported that she saw
2 the petitioner grabbing R.B.'s chest and kissing R.B. and that
3 R.B.'s pants were down around her ankles. (Pet. Ex. 22 (Tr. 65)).
4 She also stated that she had tried to call the police but the
5 petitioner had snatched her cell phone out of her hands. (*Id.* at
6 110-11). Maria Perez stated that she had become suspicious of the
7 petitioner's relationship with R.B. earlier in the day. (Pet. Ex.
8 20 (Tr. 163-64)).

9 At trial, however, Maria Perez denied both that R.B.'s pants
10 were down and that she told hotel security or the police as much.
11 (Pet. Ex. 20 (Tr. 144, 151, 160); Pet. Ex. 22 (Tr. 17-20)). She
12 testified that R.B. and the petitioner were not lying down, that
13 the petitioner was not on top of R.B., and that they were not
14 kissing; she testified she saw no part of the petitioner in or
15 near R.B.'s vagina. (Pet. Ex. 22 (Tr. 17-20)). She also denied
16 that the petitioner had prevented her from calling the police.
17 (Pet. Ex. 20 (Tr. 148)). Maria Perez testified that R.B. claimed
18 the petitioner forced her only after she threatened to tell R.B.'s
19 mother what had happened. (Pet. Ex. 22 (Tr. 28)).

20 The petitioner told police that he kissed R.B. on the neck,
21 that he had romantic feelings toward her, and that R.B. was a
22 woman. (Pet. Ex. 22 (Tr. 126-27)). He admitted to telling her he
23 was falling in love with her before their trip. (*Id.* at 130-31).
24 He denied having sex with R.B. (*Id.* at 131).

25 R.B. told security that the petitioner had pinned her down on
26 the bed and touched her and that she tried to push him off. (Pet.
27 Ex. 19 (Tr. 97-98, 141-42)). She told police that she could feel
28 the petitioner's erect penis and that she had been wearing a robe.

1 (*Id.* at 90-91, 173-75). At trial, she testified that none of this
2 was true. (*Id.* at 90-91, 97-98, 143, 173-75). R.B. testified that
3 she lied because she was afraid that if she told the truth, Maria
4 Perez would leave her alone in Vegas. (*Id.* at 97-98, 151). For the
5 same reason, she did not tell police that the petitioner put his
6 finger and tongue in her vagina. (*Id.* at 148-49). When asked if
7 she remembered this first report and whether all of it was true,
8 R.B. said, "Most of it was true and most of it was a lie." (*Id.* at
9 150).

10 A week after the Las Vegas incident, R.B. decided to tell her
11 family the truth. (Pet. Ex. 19 (Tr. 144)). She explained to them
12 that she and the petitioner had been kissing and were together.
13 (*Id.* at 100-01).

14 R.B. testified that she had known the petitioner her entire
15 life. (Pet. Ex. 19 (Tr. 49)). The summer before the incident, their
16 relationship began to change and the petitioner started calling
17 and texting her and acting romantically toward her. (*Id.* at 50-
18 54, 128-31). In June 2008, the petitioner winked at R.B. during a
19 family gathering. (*Id.* at 122-23). At another gathering, he grabbed
20 and rubbed R.B.'s feet. (*Id.* at 124, 127). The petitioner told
21 R.B. that he had feelings for her, and that he was uncomfortable
22 when she was around other boys; he also described to her dreams of
23 a sexual nature he had about her. (*Id.* at 54, 64-66). One day,
24 when R.B. and the petitioner were alone in a car, he touched her
25 thigh and hand and then they began kissing. (*Id.* at 63-64).

26 During trial, Dr. Paglini was called and asked whether, in
27 the situation of "a 13-year-old niece who had known her 33-year-
28 old uncle for her whole life and seen him on a regular basis," the

1 following hypotheticals occurring "over about a three or four month
2 period," constituted grooming, (Pet. Ex. 20 (Tr. 54-62)): the
3 perpetrator (1) "touching the nieces [sic] foot under the table at
4 family parties, maybe winking at the niece", (*id.* at 54); (2)
5 making "phone calls . . . to the individual who is being groomed"
6 telling her how pretty she was, (*id.* at 57-58); (3) making
7 "comments ... that ... the ... alleged perpetrator thought that this
8 child was someone he could trust," (*id.* at 58); (4) spending more
9 time with the niece over the three-month period, with touching and
10 winking, (*id.* at 59); (5) trying to get the 13-year-old alone with
11 him, (*id.* at 59); (6) while alone, holding his niece's hand,
12 touching her thigh, and French kissing her, (*id.* at 59); (7) making
13 statements to his niece that he was concerned about her spending
14 time with other boys, (*id.* at 60); (8) telling the niece about a
15 dream he had about taking her clothes off, (*id.* at 60); (9) sitting
16 at a table with his wife and touching the niece's foot under the
17 table, (*id.* at 61); (10) while out walking with his wife and niece,
18 with his wife in front, grabbing his niece and putting his arm
19 around her, (*id.* at 61-62); (11) touching the niece under water
20 while swimming, (*id.* at 62); and (12) inviting the niece on an
21 out-of-town trip to attend a concert, (*id.* at 62). Dr. Paglini
22 responded that all of it was potential grooming. (*Id.* at 58-60,
23 62).

24 Additionally, the State introduced a phone call between the
25 petitioner and his wife that was recorded while the petitioner was
26 incarcerated. (Pet. Ex. 21). As defense counsel refused to
27 stipulate to foundation, the State first called a witness from the
28 prison to authenticate the phone call.

1 Ultimately, the jury found the petitioner guilty on all but
2 one count. (Pet. Ex. 25). The petitioner was then sentenced to
3 several concurrent terms of imprisonment, including two terms of
4 life with the possibility of parole after thirty-five years. (Pet.
5 Ex. 33).

6 The petitioner pursued a direct appeal and a state
7 postconviction petition and appeal. Failing to obtain relief in
8 state court, the petitioner filed the instant federal habeas
9 petition.

10 **II. Standard**

11 28 U.S.C. § 2254(d) provides the legal standards for this
12 Court's consideration of the merits of the petition in this case:

13 An application for a writ of habeas corpus on behalf of
14 a person in custody pursuant to the judgment of a State
15 court shall not be granted with respect to any claim
that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim -

16 (1) resulted in a decision that was contrary to, or
17 involved an unreasonable application of, clearly
18 established Federal law, as determined by the
Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an
20 unreasonable determination of the facts in light of
the evidence presented in the State court
proceeding.

21 AEDPA "modified a federal habeas court's role in reviewing
22 state prisoner applications in order to prevent federal habeas
23 'retrials' and to ensure that state-court convictions are given
24 effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
25 685, 693-694 (2002). This court's ability to grant a writ is
26 limited to cases where "there is no possibility fairminded jurists
27 could disagree that the state court's decision conflicts with
28

1 [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86,
2 102 (2011). The Supreme Court has emphasized "that even a strong
3 case for relief does not mean the state court's contrary conclusion
4 was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
5 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)
6 (describing the AEDPA standard as "a difficult to meet and highly
7 deferential standard for evaluating state-court rulings, which
8 demands that state-court decisions be given the benefit of the
9 doubt") (internal quotation marks and citations omitted.)

10 A state court decision is contrary to clearly established
11 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254,
12 "if the state court applies a rule that contradicts the governing
13 law set forth in [the Supreme Court's] cases" or "if the state
14 court confronts a set of facts that are materially
15 indistinguishable from a decision of [the Supreme Court] and
16 nevertheless arrives at a result different from [the Supreme
17 Court's] precedent." *Andrade*, 538 U.S. 63 (quoting *Williams v.*
18 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at
19 694).

20 A state court decision is an unreasonable application of
21 clearly established Supreme Court precedent, within the meaning of
22 28 U.S.C. § 2254(d), "if the state court identifies the correct
23 governing legal principle from [the Supreme Court's] decisions but
24 unreasonably applies that principle to the facts of the prisoner's
25 case." *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413).
26 The "unreasonable application" clause requires the state court
27 decision to be more than incorrect or erroneous; the state court's
28

1 application of clearly established law must be objectively
2 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

3 To the extent that the state court's factual findings are
4 challenged, the "unreasonable determination of fact" clause of §
5 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v.*
6 *Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
7 that the federal courts "must be particularly deferential" to state
8 court factual determinations. *Id.* The governing standard is not
9 satisfied by a showing merely that the state court finding was
10 "clearly erroneous." *Id.* at 973. Rather, AEDPA requires
11 substantially more deference:

12 [I]n concluding that a state-court finding is
13 unsupported by substantial evidence in the state-court
14 record, it is not enough that we would reverse in similar
15 circumstances if this were an appeal from a district
16 court decision. Rather, we must be convinced that an
appellate panel, applying the normal standards of
appellate review, could not reasonably conclude that the
finding is supported by the record.

17 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also
18 *Lambert*, 393 F.3d at 972.

19 Under 28 U.S.C. § 2254(e)(1), state court factual findings
20 are presumed to be correct unless rebutted by clear and convincing
21 evidence. The petitioner bears the burden of proving by a
22 preponderance of the evidence that he is entitled to habeas relief.
23 *Cullen*, 563 U.S. at 181. The state courts' decisions on the merits
24 are entitled to deference under AEDPA and may not be disturbed
25 unless they were ones "with which no fairminded jurist could
26 agree." *Davis v. Ayala*, - U.S. -, 135 S. Ct. 2187, 2208 (2015).

27 The petitioner claims in this action each assert ineffective
28 assistance of counsel. Such claims are governed by *Strickland v.*

1 *Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner
2 must satisfy two prongs to obtain habeas relief—deficient
3 performance by counsel and prejudice. 466 U.S. at 687. With respect
4 to the performance prong, a petitioner must carry the burden of
5 demonstrating that his counsel's performance was so deficient that
6 it fell below an "objective standard of reasonableness." *Id.* at
7 688. "'Judicial scrutiny of counsel's performance must be highly
8 deferential,' and 'a court must indulge a strong presumption that
9 counsel's conduct falls within the wide range of reasonable
10 professional assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111,
11 124 (2009) (citation omitted). In assessing prejudice, the court
12 "must ask if the defendant has met the burden of showing that the
13 decision reached would reasonably likely have been different
14 absent [counsel's] errors." *Strickland*, 466 U.S. at 696.

15 **III. Analysis**

16 **A. Ground One**

17 In his first ground for relief, the petitioner asserts that
18 counsel on direct appeal was ineffective for failing to adequately
19 brief, and omitting meritorious arguments in support of, his claim
20 that his right to a fair trial was violated by Dr. Paglini's
21 inappropriate and unnoticed expert testimony. (ECF No. 17 at 8).

22 On direct appeal, counsel raised a single issue: that Dr.
23 Paglini's testimony was erroneously admitted. (Pet. Ex. 37). In
24 the brief, counsel argued that the notice was insufficient and Dr.
25 Paglini was not qualified to testify on grooming. (*Id.*)

26 The Nevada Supreme Court affirmed. In a 4-3 decision, the
27 Supreme Court rejected the petitioner's argument that the notice
28 was insufficient, explaining that it was filed more than a month

1 before trial, identified that Dr. Paglini would testify as to
2 grooming, and included Dr. Paglini's curriculum vitae
3 demonstrating experience relevant to his expertise. (Ex. 43 at 17-
4 18).³ The court continued:

5
6 Perez's brief argument does not allege that the State
7 acted in bad faith or that his substantial rights were
8 prejudiced because the notice did not include a report
9 or more detail about the substance of Dr. Paglini's
10 testimony. . . . Under the circumstances, we discern no
11 abuse of discretion in allowing Dr. Paglini to testify.

12 (*Id.* at 18). The court also concluded that (1) Dr. Paglini was
13 qualified to testify, (2) the testimony was relevant and, with one
14 exception, limited to Dr. Paglini's area of expertise, and (3) Dr.
15 Paglini did not improperly vouch for the victim. (Pet. Ex. 43 at
16 6-17). In part of its analysis, the court explained:

17 As to unfair prejudice, Dr. Paglini's testimony did not
18 stray beyond the bounds set by this court and other
19 jurisdictions for expert testimony. Dr. Paglini
20 generally addressed how grooming occurs and its purpose.
21 He then offered insight in the form of hypotheticals
22 that were based on Perez's conduct and indicated that
23 such conduct was probably grooming behavior. *See Shannon*
24 *v. State*, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989)
25 (providing that experts can testify to hypotheticals
26 about victims of sexual abuse and individuals with
27 pedophilic disorder). He did not offer an opinion as to
28 the victim's credibility or express a belief that she
had been abused. *See Townsend*, 103 Nev. at 118-19, 734
P.2d at 708-09. Dr. Paglini's testimony therefore meets
the first component of the "assistance" requirement.

(*Id.* at 13).

23 In state postconviction proceedings, the petitioner argued
24 that appellate counsel was ineffective for failing to argue that
25 the State's insufficient notice was in bad faith, that Dr.
26 Paglini's testimony failed to help the jury understand the evidence
27

28 ³ Citation is to ECF page number at the top of the page.

1 or determine an issue, and that the testimony caused him prejudice.
2 (Pet. Ex. 54 at 41-42, 49-50).⁴ The Nevada Supreme Court held:

3 [Appellant contends that his appellate counsel was
4 ineffective by failing to argue on direct appeal that an
5 expert's testimony failed to assist the jury in
6 understanding the evidence or determining an issue and
7 that appellant was prejudiced by the testimony. Because
8 this court nonetheless addressed these subjective issues
9 and specifically concluded that the expert's testimony
10 assisted the jury and did not prejudice appellant, . .
11 . there was no reasonable probability of a different
outcome on appeal had counsel made these arguments.
12 *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113
13 (1996) ("To establish prejudice based on the deficient
14 assistance of appellate counsel, the defendant must show
15 that the omitted issue would have a reasonable
16 probability of success on appeal."). The district court
17 therefore properly rejected this claim. . . .

18 Lastly, appellant argues that his appellate counsel
19 should have asserted that the State acted in bad faith
20 in providing an inadequate notice of the expert's
21 testimony. Appellant has not demonstrated prejudice,
22 however, because this court concluded in *Perez*, 129
23 Nev., at 862-63, 313 P.3d at 870, that the expert witness
24 notice was sufficient, and thus, any argument concerning
the State's bad faith in providing an insufficient
notice would not have altered the outcome. Further,
appellate counsel challenged the adequacy of the expert
witness notice and appellant has not pointed to anything
that demonstrates the State's bad faith or that he was
prejudiced by the expert notice. [n.3: The dissent
concludes that appellate counsel's failure to allege
that the State acted in bad faith in providing its expert
witness notice warranted an evidentiary hearing because
appellant was surprised by the expert's testimony and
did not know that the expert would be presented with
hypotheticals involving facts similar to the underlying
facts here. During a pretrial hearing, however, the
State specifically informed appellant that the expert
would testify regarding grooming techniques and then be
asked to apply his knowledge of those techniques to the
facts of this case.] Thus, the district court did not
err in rejecting appellant's claim of ineffective
assistance of appellate counsel.

25 (Pet. Ex. 57 at 2-4).

26 The petitioner asserts that Dr. Paglini's testimony was
27 highly prejudicial because it employed hypotheticals directly

28 ⁴ Citation is to original page of document.

1 mirroring the facts of the case, which suggested that the
2 petitioner had groomed R.B. and was akin to profile evidence, which
3 is generally inadmissible. In addition, he argues, the testimony
4 had the effect of rationalizing R.B.'s inconsistent testimony.⁵ He
5 argues that the case against him was weak, as evidenced by R.B.
6 and Maria Perez's inconsistent and conflicting statements. The
7 petitioner argues that given the highly prejudicial nature of Dr.
8 Paglini's testimony and the weak evidence supporting his guilt, it
9 is reasonably likely that at least one justice on direct appeal
10 would have voted to reverse his conviction if counsel had
11 appropriately briefed the appeal.

12 The state courts were not objectively unreasonable in
13 concluding that the petitioner had not shown a reasonable
14 likelihood of a different result if his counsel had made these
15 arguments. The majority justices concluded on postconviction
16 review that they would not have decided the appeal any differently
17 even if counsel had briefed the appeal as the petitioner asserts
18 he should have - either because they actually decided the issues
19 or because the petitioner's claims were unsupported. This was a
20 reasonable conclusion. Many of the arguments the petitioner
21 asserts should have been raised were in fact raised in the amicus
22 brief and/or addressed directly by the court in its majority
23 opinion. While bad faith was not argued or decided by the court
24 on direct appeal, the postconviction court held that there was no
25 evidence of bad faith and that the petitioner was not surprised by

26
27 ⁵ The petitioner additionally makes several arguments for the first time
28 in his reply. The court will not consider contentions raised for the
first time in the reply. See *Zamani v. Carnes*, 491 F.3d 990, 997 (9th
Cir. 2007).

1 Dr. Paglini's testimony. These conclusions were not objectively
2 unreasonable. Thus whatever the deficiencies of counsel's
3 briefing, it is not reasonably likely that a better brief would
4 have changed the result.

5 In sum, the state courts' conclusion that the petitioner
6 suffered no prejudice from the alleged deficient performance of
7 counsel is not contrary to, or an unreasonable application of,
8 clearly established federal law, nor is it an unreasonable
9 determination of the facts. Accordingly, the petitioner is not
10 entitled to relief on Ground One.

11 B. Ground Two

12 In his second ground for relief, the petitioner asserts that
13 trial counsel was ineffective for (1) "irrationally failing to
14 stipulate to the foundation of" a jail call made by the petitioner;
15 and (2) allowing an attorney to participate in the trial despite
16 having his license suspended for mental health reasons. (ECF No.
17 17 at 17).

18 i. Jail Call

19 Before trial began, the State advised the court that it would
20 be introducing the transcript of a phone call between the
21 petitioner and his wife, recorded while the petitioner was
22 incarcerated, and that it would need to call a witness from the
23 jail to authenticate the call because the defense was refusing to
24 stipulate to foundation. Defense counsel responded to this by
25 stating he was "not stipulating to anything." (See Ex. 17 (Tr. 17-
26 18)). Defense counsel explained that he had several objections to
27 the phone call coming in but that he would continue to refuse to
28

1 stipulate even if the court otherwise deemed the call admissible.
2 (*Id.* at 18-22).

3 Later, defense counsel stated that he was not stipulating to
4 foundation because he was certain the jury would know or at least
5 suspect the calls were recorded while the defendant was in jail.
6 (See Ex. 19 (Tr. 181-83)). The court told counsel that the
7 recording was probably going to come in and to focus on whether he
8 wanted any prejudicial statements redacted therefrom. (*Id.* at 183-
9 86).

10 The next day, the court ruled that the call was coming in and
11 told defense counsel to decide whether to stipulate to foundation.
12 (Ex. 20 (Tr. 10)). Defense counsel replied, "I can't help them
13 with their case, Judge." (*Id.*) The court responded, "Actually, I
14 think it's helping your client." (*Id.* at 10-11). The court then
15 asked the petitioner whether he was "on board with that decision."
16 (*Id.* at 11). After counsel and the petitioner spoke, the petitioner
17 invoked the Fifth Amendment. (*Id.*) The court advised that its
18 question did not implicate the Fifth Amendment and that she just
19 wanted to make sure the petitioner was on board because she
20 believed that counsel's refusal to stipulate would be prejudicial
21 to the defense. (*Id.* at 11-12). Then, for the next forty-five
22 minutes, the court went back and forth with the petitioner and
23 counsel about whether the petitioner could refuse to answer the
24 question. (*Id.* at 12-39). At some point, defense counsel stated
25 that he did not think the State could get the call in without
26 causing reversible error. (*Id.* at 29). Eventually the court ceased
27 the discussion, concluding that she would assume that the
28 petitioner agreed with his counsel's strategy. (*Id.* at 39).

1 During the testimony of the jail witness that followed,
2 defense counsel immediately moved for a mistrial on the grounds
3 that the jury now knew his client was incarcerated. (Ex. 20 (Tr.
4 90-92)).

5 In his state postconviction petition, the petitioner argued
6 that trial counsel was ineffective for failing to stipulate to the
7 foundation for the call, thus assuring that the jury would hear
8 from a State witness that the petitioner was incarcerated. The
9 Nevada Supreme Court addressed the petitioner's claim as follows:

10 [C]ounsel's decision not to stipulate to the foundation
11 for a jail phone call did not establish deficient
12 representation as the decision was merely a trial
13 strategy and appellant was given the opportunity to
14 contest that trial strategy, but chose not to do so. See
15 *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-
16 81 (1996) (providing that a strategy decision "is a
tactical decision that is virtually unchallengeable
absent extraordinary circumstances" (internal
quotations omitted)). [Thus], ... appellant failed to
establish a deficiency in his trial counsel's
representation. . . ."

17 (Pet. Ex. 57 at 3).

18 There is sufficient evidence in the record made during the
19 trial court proceedings to support the Nevada Supreme Court's
20 conclusion that counsel's refusal to stipulate to the foundation
21 for the call was strategic. Counsel stated that he was not going
22 to help the State put on its case, and that he believed
23 introduction of the petitioner's incarceration status would be
24 grounds for reversal. Counsel further suggested he believed the
25 jury would surmise the call had been recorded while the petitioner
26 was in jail. The court cannot conclude that the Nevada Supreme
27 Court was objectively unreasonable in concluding that counsel's
28 refusal to stipulate to foundation was a strategic decision within

1 the wide bounds of reasonable representation.⁶ Accordingly, the
2 petitioner is not entitled to relief on Ground Two(A).

3 ii. Suspended Attorney

4 In Ground Two(B), the petitioner asserts that trial counsel
5 was ineffective for allowing John Rogers to participate in his
6 representation despite the fact that Rogers' license had been
7 suspended for mental health issues. (ECF No. 17 at 17). The
8 petitioner argues that Rogers "participated in bench conferences,
9 sat at the defense table, addressed the court, and even appeared
10 as counsel in the court documents and transcripts." (*Id.* at 22).
11 The Nevada Supreme Court addressed this claim as follows:

12 [A]ppellant failed to include specific factual
13 allegations that demonstrated that without the
14 unlicensed attorney's participation in the trial, he
15 would have received a more favorable outcome. Thus, he
16 failed to establish that the unlicensed attorney's
17 participation was deficient assistance of counsel by
18 either the unlicensed attorney or his trial counsel.

19 (Pet. Ex. 57 at 3).

20 The petitioner concedes it is unknown the extent to which
21 Rogers participated but asserts that where there is *de facto*
22 absence of counsel, prejudice can be presumed. The respondents
23 assert that the record suggests that Rogers primarily sat behind
24 the counsel table and took notes and that it was the petitioner's
25 counsel who did everything during trial. In reply, the petitioner
26 argues that he was never given the opportunity to develop his claim
27 of prejudice on this claim and that the court should therefore
28 conduct an evidentiary hearing.

29 ⁶ The court therefore need not, and does not, address respondents'
30 alternative contention that the petitioner was not prejudiced by
31 counsel's conduct.

1 First, the petitioner has provided no legal or factual support
2 for his assertion that Rogers' participation in his defense
3 resulted in a *de facto* deprivation of counsel. The petitioner was
4 represented by licensed counsel. Further, Rogers' license was
5 suspended and not revoked. Under these circumstances, there is no
6 support for the finding that the petitioner suffered *de facto*
7 deprivation of counsel. See *United States v. Hoffman*, 733 F.2d
8 596, 599-601 (9th Cir. 1984).

9 Second, the petitioner has not established a reasonable
10 likelihood of a different outcome had Rogers not participated in
11 his trial. There is no evidence or specific factual allegation of
12 how Rogers influenced any events during the trial, much less a
13 compelling argument that the result of trial would have been
14 different had those events not occurred. The state courts were not
15 therefore objectively unreasonable in rejecting this claim.

16 Indeed, the petitioner concedes that his claim is unsupported
17 but argues that he is entitled to an evidentiary hearing to develop
18 the factual basis of his claim. For the reasons discussed *infra*,
19 the petitioner is not entitled to an evidentiary hearing on this
20 claim.

21 Accordingly, the petitioner is not entitled to relief on
22 Ground Two(B).

23 **IV. Request for Evidentiary Hearing**

24 Although the petition contains a request for an evidentiary
25 hearing, there is no argument provided in support of that request
26 in the petition nor is there a separately filed motion for an
27 evidentiary hearing. While the reply contains argument in support
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1 of the request, the court will not consider arguments raised for
2 the first time in the reply. *Zamani*, 491 F.3d at 997.

3 Further, even if the court were to consider the petitioner's
4 arguments, the request for a hearing would be denied, as the
5 petitioner has made no "colorable allegations that, if proved at
6 an evidentiary hearing, would entitle him to habeas relief."
7 *Williams v. Filson*, 908 F.3d 546, 564-65 (9th Cir. 2018).

8 **V. Certificate of Appealability**

9 In order to proceed with an appeal, the petitioner must
10 receive a certificate of appealability. 28 U.S.C. § 2253(c)(1);
11 Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d
12 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*,
13 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must
14 make "a substantial showing of the denial of a constitutional
15 right" to warrant a certificate of appealability. *Allen*, 435 F.3d
16 at 951; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473,
17 483-84 (2000). "The petitioner must demonstrate that reasonable
18 jurists would find the district court's assessment of the
19 constitutional claims debatable or wrong." *Allen*, 435 F.3d at 951
20 (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
21 inquiry, the petitioner has the burden of demonstrating that the
22 issues are debatable among jurists of reason; that a court could
23 resolve the issues differently; or that the questions are adequate
24 to deserve encouragement to proceed further. *Id.*

25 The court has considered the issues raised by the petitioner,
26 with respect to whether they satisfy the standard for issuance of
27 a certificate of appealability and determines that none meet that
28

1 standard. Accordingly, the petitioner will be denied a certificate
2 of appealability.

3 **VI. Conclusion**


4 In accordance with the foregoing, IT IS THEREFORE ORDERED
5 that the first amended petition for writ of habeas corpus (ECF No.
6 17) is hereby DENIED.

7 IT IS FURTHER ORDERED that the petitioner is DENIED a
8 certificate of appealability.

9 The Clerk of Court shall enter final judgment accordingly and
10 CLOSE this case.

11 IT IS SO ORDERED.

12 DATED: This 14th day of September, 2020.

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15 UNITED STATES DISTRICT JUDGE
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